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In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN F. DRISCOLL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
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After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of aiding and abetting the smuggling of aliens into the United States in violation of 8 U.S.C. 1324 and 18 U.S.C. 2, and of conspiring to smuggle aliens in violation of 18 U.S.C. 371. He received concurrent sentences of one year's imprisonment on both counts and a $1,000 fine on the aiding and abetting count. The court of appeals affirmed the aiding and abetting conviction, but reversed the conspiracy conviction on the ground that one of the overt acts alleged was not in furtherance of the conspiracy (Pet. App. 12–17).

455-142—72

The evidence, much of which is set forth in the opinion below (Pet. App. 12–14), showed that on the morning of October 23, 1968, one Eduardo Fontes, a Portuguese citizen living in Boston, Massachusetts, visited the law offices of petitioner, a Boston attorney with a substantial immigration practice. Fontes told petitioner that his brother and brother-in-law, who were Portuguese nationals and had recently arrived in Montreal, Canada, desired to enter the United States. Petitioner's subsequent efforts, through the American consul in Montreal, to have visitors' visas authorized failed.

On October 25, 1968, petitioner's secretary, acting on petitioner's instructions, telephoned Fontes and told him to call one Christo Konstantakis, a Canadian citizen living in Massachusetts.[1] (Tr. 17–20, 260–261, 513). In their telephone conversation, Konstantakis told Fontes, whom he had never met, that he had spoken with petitioner about Fontes, and that for $800 he could arrange to have Fontes' relatives smuggled across the Canadian border into the United States (Tr. 25, 29–30, 263–264). Fontes agreed to pay the money (Tr. 30).

On October 29, 1968, Fontes telephoned petitioner at his office and discussed Konstantakis' $800 fee (Tr. 265–266, 364–365). Petitioner told Fontes he could meet his relatives at the law office when they arrived from Canada (Tr. 278–279). Later that day, the two

[1] "Tr." refers to the 4-volume trial transcript, a copy of which we are lodging with the Clerk of this Court.

aliens were arrested by U.S. Border Patrol officers in Vermont, after the aliens had illegally entered the country (Tr. 173–176).[2]

Petitioner testified at trial that he knew nothing of the smuggling scheme until Konstantakis mentioned it to him on the day the aliens were arrested. According to petitioner, he immediately ordered Konstantakis to stop the plan, but when Konstantakis informed him it was too late, he told Konstantakis to telephone him when the aliens arrived (Tr. 365–366).

Konstantakis, who testified for the government, disputed petitioner's professed ignorance of the smuggling scheme. Konstantakis stated that petitioner, in a telephone conversation before Konstantakis knew Fontes, first suggested smuggling the aliens. Petitioner at that time asked Konstantakis to arrange for two aliens to be smuggled in from Canada and told him that a relative of the aliens named Fontes would soon call to arrange the details (Tr. 23–26).

1. Petitioner argues that the trial court's use of the phrase "consented to" in the jury instruction on aiding and abetting constitutes reversible error since, standing alone, the phrase might suggest that mere acquiescence by petitioner could make him responsible for the criminal actions of others. However, when read in its entirety, the court's instruction clearly conveyed to the jury that petitioner could only be

[2] Konstantakis and the aliens subsequently pleaded guilty in the United States District Court for the District of Vermont to federal criminal charges arising from this incident (Tr. 151, 176, 196).

convicted as an aider or abetter if he acted willfully and with specific intent.[1]

2. As the court of appeals indicated in its memorandum opinion denying petitioner's motion for a rehearing (Pet. App. 18), petitioner's requested instruction regarding his failure to inform the authorities (Tr. 692–693) might have misled the jury. Regardless of whether petitioner had a legal duty to report the smuggling scheme, his failure to do so was relevant and could properly be considered by the jury (Pet. App. 14). But petitioner's requested instruction might have led the jury to suppose that his failure to report the crime was devoid of any significance.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
FREDERICK W. READ, III,
Attorney.

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[1] The trial court instructed the jury (Tr. 678–679):

> An act is done wilfully if it is done voluntarily and purposely and with the specific intent to do that which the law forbids, which is to say, with the bad purpose of disobeying the law or disregarding the law.
>
> * * * whoever wilfully causes an act to be done, which, if directly performed by him would be an offense against the United States, is punishable as a principal. Whatever a person is capable of doing himself, he can do through another person or by causing another person to do the act. So that, if the acts of another person are wilfully ordered, directed, authorized, or consented to by a defendant, he is just as responsible for those acts as if he personally committed them.

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